No. 84-435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

PETITIONER'S REPLY BRIEF

JULIUS LUCIUS ECHELES
FREDERICK F. COHN
KATHLEEN KELLER
35 East Wacker Drive
Chicago, IL 60601
(312) 782-0711
Attorneys for Petitioner

Pandick Midwest, Inc., Chicago • 454-7600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

PETITIONER'S REPLY BRIEF

ARGUMENT

Petitioner primarily relies on his original Brief.

Responding *seriatim* to the sections of the government's Argument:

(1) First, the government attacks petitioner's position that the statute, 18 U.S.C. 844(i), is restricted to business (as

opposed to residential) property, arguing: (i) that such restriction specifically was rejected when the section was enacted in 1970; (ii) that examination of sec. 844(e) confirms that Congress intended no distinction between residential and business property; and (iii) that the legislative history on which petitioner primarily relies is not inconsistent with the conclusion that Congress exercised its commerce power fully.

To respond:

(i) The government points out that section 844(i), as originally proposed, prohibited the destruction of "any building * * * *used for business purposes* by a person engaged in commerce or in any activity affecting commerce," (emphasis added by government; G. Br. 10), and that this phrase was deleted after testimony and discussions at the 1970 Hearings on Explosives Control, (cited by government at G. Br. 11, *et seq.*), because of a desire to cover such premises as churches and schools, which would have been excluded from the section's coverage, had the phrase not been deleted. (G. Br. 11) The language that was included in the bill as enacted, "any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C 844(i), still requires that the building be *used* in commerce or in an activity affecting commerce. Petitioner submits this language does not justify coverage of residential (albeit rental) property, as at bar, because this property was not "used in . . . commerce or in any activity affecting . . . commerce." Deletion of the "business purposes" phrase in order to extend coverage to buildings such as churches and schools does not eliminate the requirement for a logical interstate commerce nexus vis-a-vis *use* of the building.

(ii) Because section 844(e) applies to threats to destroy "any building," regardless of its use, if such threats are made "through the use of the mail, telephone, telegraph, or other instrument of commerce," 18 U.S.C. 844(e), the government argues this demonstrates an intent

that sec. 844(i) cover "any building" as well. (G. Br. 12-13) But the government overlooks that the use of the interstate communication facility itself provides the interstate nexus for sec. 844(e). Since there is no such communication facility nexus with respect to sec. 844(i), that section's requirement, "used in . . . commerce or in any activity affecting . . . commerce," provides the necessary jurisdictional nexus. Thus, *United States v. Fears,* 450 F.Supp. 249 (E.D. Tenn. 1979), (G. Br. 8, fn. 7 & G. Br. 12), holding that a telephone threat to destroy residential property was covered by sec. 844(e), is not persuasive with respect to construction of sec. 844(i); for the interstate communication facility nexus in sec. 844(e), construed in *Fears,* removes the necessity for an interstate nexus with respect to the building itself.

(iii) Immediately following the statement that sec. 844(i)'s use of the phrase "affecting commerce" "represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,'" comes the language on which petitioner (and the *Mennuti*[1] decision) relies: "[T]his is a very broad provision covering substantially all business property." [1970] U.S. Code Cong. & Adm. News 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, at 69-70. (See Pet. Br. 10, 15-16.) The government points out that the statement regarding "business property" "may be regarded as providing an important example of property that Section 844(i) covers." (G. Br. 13) We submit it may be just as reasonably regarded as a description of the entirety of the property covered, and that the interpretation advanced by the government (and espoused by the District Court[2], 563 F.Supp. at 1088 n.2; see G. Br. 13), rests on unsupported supposition.

---

[1] *United States v. Mennuti,* 639 F.2d 107 (2 Cir. 1981).

[2] *United States v. Russell,* 563 F.Supp. 1085 (N.D. Ill. 1983).

(2) Second, the government argues that the building in question was "used in * * * [an] activity affecting interstate commerce" (G. Br. 6) in three ways: (i) the building was heated by gas that moved in interstate commerce, (ii) it was used for rental purposes, and (iii) petitioner attempted to use it to defraud an insurance company.

While petitioner does not quarrel with the principles of any of this Court's decisions cited and relied on by the government as to the scope of the commerce clause, (G. Br. 8-9, 14-15), none of those decisions is directly in point, and none gives any particular guidance with respect to any of the factors upon which the government relies. To respond:

(i) Neither of the Court of Appeals decisions relied on by the government in support of the "interstate fuel" nexus theory is persuasive. (G. Br. 16) In *United States v. Barton*, 647 F.2d 224 (2 Cir. 1981), the reviewing court found that consumption in the building of coffee and orange juice from out-of-State, and use of out-of-State fuel in heating the building, constituted "alternative jurisdictional predicates." *Id.* at 232-33.[3] The government has pointed to no decisions resting on a nexus of interstate fuel. It argues that *United States v. Andrini*, 685 F.2d 1094 (9 Cir. 1982), holding that an office building under construction with interstate materials was covered by the statute, inferentially supports the argument that where an interstate nexus exists apart from the use of the building, the use thereof is irrelevant. Since the building under construction in *Andrini* was to contain commercial enterprises, this argument is moot speculation.

---

[3] The court in *Barton* noted that the commercial use of the buildings distinguished that case from *Mennuti*, "in which we held that § 844(i) does not apply to private dwellings, *notwithstanding several interstate contacts involving* financing, insurance, *fueling*, and use of building materials." *Id.* at 232 n.8. (Emphasis added.)

(ii) In support of its position that the building was "used in an activity affecting interstate commerce because he rented it," (G. Br. 17), the government relies on *United States v. Hansen,* No. 84-1500 (8 Cir., decided Feb. 22, 1985), and *United States v. Zabic,* 745 F.2d 464 (7 Cir. 1984), (G. Br. 17-18), holding a 14-unit and a 43-unit apartment building, respectively, within the scope of sec. 844(i). The facts of those cases justify a finding that each building was used in an activity affecting commerce. These decisions are fully discussed, and factually distinguished from the case at bar, in Petitioner's Brief, pp. 7-8. We submit the difference is not merely one of degree. (*Cf.* G. Br. 18.)

The government's additional reliance on *McLain* v. *Real Estate Board,* 444 U.S. 232, 62 L.Ed.2d 441 (1980), (G. Br. 17), reversing dismissal of a Sherman Act complaint, is ill-advised; for while this Court recognized that in a factual showing at trial, "it may be possible for petitioners to establish that . . . an appreciable amount of interstate commerce is involved with the local residential real estate market arising out of the interstate movement of people," *id.* at 245, 62 L.Ed.2d at 452-53, this aspect of the decision outlines what the future proof might possibly show, and does not support the conclusion that the rental (or sale) of residential units necessarily affects the interstate movement of people. The interstate nexus deemed sufficient to defeat respondents' motion to dismiss the complaint for lack of jurisdiction under F.R.C.P. 12(b)(1) was, per this Court, on established (not hypothetical) facts, that the sale of local residential real estate necessarily entailed title insurance and real estate financing involving interstate corporations and lending institutions. *Id.* at 245, 62 L.Ed.2d at 452.

(iii) The government's argument that petitioner's attempt to destroy the building to defraud an insurance

company provides the interstate nexus, rests upon subsequent legislative history of sec. 844(i). (G. Br. 18-20) The government concedes there are no decisions even arguably supporting this position. (See G. Br. 20, fn. 23.)

Indeed, the same legislative history supports petition's position that Congress intended to exclude residential property from sec. 844(i). When Congress amended sec. 844(i) in 1982, to clarify that arson "by fire" as well as bombing was included, it could have, but did not, amend the section so as to overrule *Mennuti, supra.* Assuming that at least some of the legislators are lawyers, and that their expertise included an awareness of the Second Circuit's *Mennuti* position excepting small-scale, residential (though rental) property from the statute's reach, their failure to overrule *Mennuti* by subsequent legislation—as they could well have done—when other aspects of the section were revised in 1982, is inferential proof that Congress had no intention of including the "one-tenant building."

(3) Finally, the government argues (i) that the "rule of lenity" in statutory construction does not apply here, because the statute is not ambiguous, and (ii) that there is no need for narrow construction to avoid federalism problems.

While the section here in issue is clear to the government, which perceives it as applying to a two-flat building, it is equally clear to the Second Circuit in *Mennuti, supra,* that such a building is not within the section. Therefore, it must be ambiguous, in that rational persons have construed it with opposite conclusions. While Congress expressed its intention to exercise its commerce power to the fullest, reasonable men reasonably have differed as to the scope of the phrase, "used in commerce or in any activity affecting commerce."

We fail to perceive the significance of Congressional consideration and rejection of a requirement that the Attorney

General authorize prosecutions, or of the later decision to rely on discretionary decisions by government enforcement officials respecting "which cases warranted federal involvement . . ." (G. Br. 22); that "Congress was well aware it was creating overlapping federal jurisdiction in areas of criminal law traditionally reserved to the states." (G. Br. 23) Nor does it seem to matter—in terms of statutory construction principles—that local law enforcement authorities have "requested" "federal involvement." (G. Br. 24)

Although federal enforcement officials testified at the 1982 hearing that the Bureau of Alcohol, Tobacco and Firearms had "focused its resources in the arson area on those schemes involving commercial premises * * * or members of organized 'arson rings,'" and Congress expressly approved this focus, (see G. Br. 22, fn. 26, citing Hearings), "relying on federal officials to select appropriate cases for federal involvement and to leave other prosecutions to state and local authorities," (G. Br. 22, fn. 26), the instant case demonstrates that federal prosecution is not limited to such area of focus—and for that reason, the section, as utilized in reality, in this case, does "make every arson a federal crime," (G. Br. 22, fn. 26), contrary to the testimony of a Treasury Department official that the bill "would not make every arson a federal crime."

* * *

We were not merely indulging in humorous speculation when we posited the *extremis* example of the outhouse as possibly the last bastion outside the reach of the commerce power. (See Pet. Br. 17.) While the government has not responded to this *"reductio ad absurdum"* argument, we wonder whether, if it did, the argument would be (*c.f.* G. Br. 18) that it is only "a matter of degree." But it is precisely when the degree becomes so relatively minuscule that it becomes *"de minimus,"* that it is no longer merely a matter of degree; it becomes a matter of substance, affecting the very quality of the thing.

* * *

It stretches both logic and language beyond their permissible scope to adopt the government's position as to the proper construction of sec. 844(i). Neither the interstate fuel nexus, nor the fact that a single tenant rented a flat, nor petitioner's intent to defraud an insurance company, establishes the statutory element—here, a jurisdictional requirement as well—as that the building was "used in or in an activity affecting commerce." This is one of those cases that should have been left to enforcement by the States, per the federal enforcement officials' supposed guidelines. (See G. Br. 22, fn. 26.)

This Court should so construe the statute as to except therefrom the building in this case, because on the evidence, it was not "used in or in an activity affecting commerce."

CONCLUSION

For the reasons stated in Petitioner's Brief, as amplified by this Reply, petitioner's conviction should be reversed.

Respectfully submitted,

JULIUS LUCIUS ECHELES*
FREDERICK F. COHN
KATHLEEN KELLER
Attorneys for Petitioner

---

* Researcher-amanuensis Caroline Jaffe participated in preparation of this Reply.